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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

TAMARA WARNER et al., Plaintiffs and Respondents, v. CITY OF CITRUS HEIGHTS POLICE DEPARTMENT et al., Defendants and Appellants.	C060482 (Super. Ct. No. 34200800015215CUWTGDS)

Defendants -- City of Citrus Heights Police Department (CHPD), Chief of Police Christopher W. Boyd, Commander Bryan Roberts, and Lieutenant Thomas Chaplin -- appeal from the trial court's denial of their motion to strike as a SLAPP (Strategic Lawsuit Against Public Participation; Code Civ. Proc. § 425.16[1]),

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[1] Undesignated statutory references are to the Code of Civil Procedure.

Section 425.16 provides: "(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the

a complaint filed by former employees -- plaintiffs Tamara Warner, Tasha Thompson, and Jo Moya -- alleging sexual orientation discrimination in employment. (§ 425.16, subd. (*i*) [an order granting or denying a section 425.16 motion is appealable].)

Defendants contend reversal is required because (1) the complaint arises from public entity investigation and personnel procedures which constitute protected activity under section 425.16; (2) plaintiffs have not met their burden to show probability of success on the merits; and (3) the complaint is barred for other reasons such as the litigation privilege (Civ. Code, § 47), governmental immunity (Gov. Code, § 815 et seq.), failure to exhaust remedies, etc. We shall reverse the judgment (order) in part and strike three counts (discrimination, retaliation, and wrongful termination in violation of public policy) on the ground of section 425.16. We shall affirm the judgment (order) as to the counts for harassment, failure to

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court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. . . ." An act in furtherance of the right of petition or free speech in connection with a public issue includes, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; . . . (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

prevent harassment, and intentional infliction of emotional distress, because defendants failed to meet their threshold burden to show these counts arise from activity protected under section 425.16. We shall award section 425.16 attorney fees to defendants for their partial success, and remand for the trial court to determine the amount.

BACKGROUND

In July 2008, plaintiffs filed a "COMPLAINT FOR DAMAGES, SEXUAL ORIENTATION DISCRIMINATION [Gov. Code, § 12940]; RETALIATION; WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY; HARASSMENT; FAILURE TO PREVENT HARASSMENT; [and] INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS[.]" The unverified complaint alleged as follows:

Plaintiffs are homosexual females and were CHPD police sergeants or officers. Coworkers spread rumors and made disparaging remarks about Warner and Thompson being involved in a sexual relationship. Warner complained to CHPD about a hostile working environment but believes no corrective action was taken. CHPD questioned Warner about her personal life. She told them the questioning was inappropriate and she was not involved in "a relationship" with Thompson. The rumors increased when Warner and Thompson took a vacation together, with others, at a time when both women were involved in other relationships. CHPD investigated and found no hostile working environment based on sexual orientation.

Warner and Thompson received positive job evaluations.

In September 2007, CHPD asked Warner if she and Thompson were living together, but they were not. CHPD falsely accused Warner of posting in her workspace a photograph of Thompson.[2]

On September 19, 2007, CHPD placed Warner on administrative leave. A notice of Internal Affairs (Investigative Services Division (ISD)) investigation said she had engaged in conduct unbecoming an officer, mistreated coworkers, and misled her supervisors. On September 21, 2007, defendant Chaplin accused Warner of giving Thompson special treatment.

On September 25, 2007, before the end of their probationary period, CHPD terminated both Warner and Thompson, for failing to meet performance standards.

As to Moya, the complaint alleged that, after she was promoted from officer to sergeant, she reported to Chief Boyd that she was dating a female officer who was her subordinate. The chief said there was no policy but one would be forthcoming, and the relationship would likely have an adverse effect on Moya's career. Moya felt she had no choice but to end the relationship. After receiving an evaluation that she was "Meeting Expectations," Moya was demoted to officer and then terminated without explanation.

Plaintiffs alleged, on information and belief, that they received disparate treatment based on their sexual orientation;

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[2] The evidence is disputed as to the nature of the photograph and whether it was displayed. For purposes of this appeal, it does not matter.

that heterosexual superior-subordinate couples at CHPD were not questioned, harassed, subjected to investigation, terminated, or disciplined. Plaintiffs were subjected to excessive, pervasive and outrageous gossip, jokes, and inquiry into private affairs because of their sexual orientation. CHPD failed to take reasonable steps to remedy the hostile environment, and the individual defendants participated in, ratified, authorized and/or failed to remedy it. Plaintiffs received "Right-To-Sue" letters from the Department of Fair Employment and Housing (DFEH).

In September 2008, defendants filed their anti-SLAPP motion, noting no plaintiff was dismissed for having a personal relationship at work. Plaintiffs (probationary employees) were dismissed for dishonesty, conduct unbecoming an officer, and/or performance failures, and the core of the complaint attacked defendants for performing their official and legally-required duties to investigate peace officer misconduct, including nonperformance of duties, and to take corrective action.

Defendants submitted evidence, including evidence that Warner and Thompson were deceitful about their relationship. Defendants conducted an investigation into a rumor that Warner and (her subordinate) Thompson were dating -- a relationship which Warner and Thompson denied. Such a relationship was not prohibited by CHPD but would require extra care to assure Warner did not supervise Thompson and thus avoid problems of perceived

favoritism and conflict of interest. After initially denying the relationship, Warner admitted it.

Thus, excerpts from a CHPD ISD interview with Warner on September 21, 2007, shows she said she previously answered "no" when asked if she was dating Thompson, because to Warner, "a dating relationship is you actually go out on dates with them, and you do stuff like that. Whereas, I was -- Tasha [Thompson] and me, we're best friends. I mean, we still are, but it's -- to me that's -- there were times that we had sex and that was it. I mean, it was -- there was nothing more than that." They went to Cancun together, but the trip was planned before Thompson began working at CHPD, and they went with Warner's sister and brother-in-law. Warner acknowledged she was "probably" in an intimate relationship with Thompson at some point during which she was responsible for supervising Thompson at work (though Warner denied giving Thompson favorable treatment). Warner said she thought her relationship with Thompson did "cross[] a line," but Warner did not notify CHPD because "I felt that was going to be the last time. It wasn't going to happen again." Warner did not believe she gave a false or misleading statement to her supervisors when she said words to the effect of "I have not had a relationship with" Thompson. Most of the time, when they went out, other people went with them. When they stayed on a houseboat, others were there, including Officer Kell, who later became upset with Warner for

giving her a score of "satisfactory" rather than "good" on an evaluation.

Warner acknowledged it would be "unethical" for a supervisor to date a subordinate without reporting it to CHPD command staff, so that arrangements could be made to avoid conflict of interest. When asked why she did not just come forward at any time and report that she was having an intimate relationship with Thompson, Warner said, "It was a bad judgment call, and I thought it would not happen again when I had intimate relations with her." Warner indicated the intimate relationship lasted a couple of months.

Defendants also submitted declarations of the individual defendants and other CHPD personnel attesting to the following:

Warner, who had prior law enforcement experience, began work as a CHPD sergeant on March 28, 2006. Thompson (who also had prior experience and was hired at Warner's recommendation) began work as a CHPD police officer in June 2006, and was assigned to the prestigious position of canine officer in August 2006. All CHPD personnel serve an 18-month probationary period in both original hire and promotional positions.

CHPD Policy 340.38(c) requires supervisors to prevent the unequal or disparate treatment of employees for malicious "or other improper purpose." The rule, which has been in effect throughout CHPD's history, ensures fairness and avoids favoritism, which is particularly important in a law enforcement setting. Based on this rule, CHPD has a consistent practice to

reschedule employees -- regardless of sexual orientation -- who begin dating each other, so that no supervisor is directly supervising someone with whom he or she is in a dating or marital relationship.

In October 2006, there was a rumor at CHPD that Warner was dating her direct subordinate, Thompson. (Thompson was under the command of both Warner and a Sergeant Wheaton.) The Chief asked Lieutenant Ray Bechler (Warner's direct supervisor) to ask Warner if it was true. If it was true, they would reassign Warner; if it was false, they would take steps to stop circulation of the rumor. Bechler reported back that Warner denied dating Thompson, and Chief Boyd instructed command staff to stop anyone from spreading the rumor.

A February 2007 evaluation rated Warner's performance as "Commendable," the second highest rating. In February 2007, Wheaton rated Thompson's performance as "Commendable."

In March 2007, Lieutenant Gina Anderson reported to the Chief that one of Warner's peers raised a concern that Warner believed another employee was spreading a rumor that Warner was dating Thompson. Anderson talked with Warner and Thompson, who said they had never had a dating relationship (despite being told by Anderson that such a relationship was not prohibited), were upset by the rumor and believed it was motivated by their sexual orientation. Chief Boyd ordered an ISD investigation of the allegation that a rumor was being circulated due to sexual orientation bias. The investigation was conducted pursuant to

CHPD policies setting forth procedures for inquiries into employee misconduct, as required by California law.

In April 2007, CHPD rated Warner's performance as "Commendable."

In May 2007, ISD concluded the allegation of sexual orientation harassment was unfounded. The person alleged to have spread the rumor simply asked an officer, on one occasion, out of curiosity only, whether Warner was dating Thompson.

In June 2007, Wheaton rated Thompson's work performance evaluation as "Exceptional," the highest rating. Also in June 2007, the Chief promoted Warner from Patrol Sergeant to Detective Sergeant.

In August 2007, Thompson applied for a promotion to sergeant. Part of the promotional process is a "peer review," in which CHPD personnel may opine on the candidate's suitability for promotion. In September 2007, CHPD received a peer review response from CHPD Officer Jennifer Kell, who expressed concern about Thompson's suitability for promotion, on the ground that, during the March 2007 ISD investigation, Thompson and Warner had asked Kell to lie about the fact they were dating and to accuse the alleged perpetrator of the rumor of being biased against lesbians. Kell felt intimidated, because Warner was her supervisor. Kell alleged in her peer review that Warner had admitted lying to Lieutenant Bechler when he asked if she was dating Thompson. Kell repeated these allegations in a meeting with Lieutenant Bechler. Kell's allegations indicated a

possibility that Warner had violated CHPD personnel policy against making false or misleading statements, and the policy prohibiting conduct unbecoming to a CHPD member.

Chief Boyd ordered an ISD investigation, in compliance with the CHPD policies. The investigation ultimately concluded Warner engaged in acts of dishonesty, conduct unbecoming her position and disrespectful treatment of others within CHPD, and Thompson was actively involved in the acts of dishonesty and cover-up.

Investigators interviewed Kell, who said she was friends with Warner and Thompson, had accompanied them on trips, and knew they were romantically involved. The Warner-Thompson relationship was affecting Kell's work environment, because Warner and Thompson were sometimes tense around each other in the workplace, and Warner's threats for Kell to cover up the relationship made Kell fear for her job.

Another CHPD employee said she felt intimidated by Warner's apparent anger at the employee talking to Thompson.

In September 2007, Chief Boyd terminated Warner and Thompson (both of whom failed to disclose the relationship when questioned by Lt. Anderson) for failure to meet the standards of probation by engaging in dishonesty and conduct unbecoming CHPD members. He attested his decision had nothing to do with sexual orientation or any protected activity.

As to Moya, she began work as a CHPD police officer on March 22, 2006, and was promoted to sergeant (with an 18-month

probation period) on May 15, 2006. In January 2007, Moya volunteered to her supervisors and, at their suggestion, to Chief Boyd, that she had dated a direct subordinate, Officer Michelle Brown, but realized it was inappropriate and a mistake. The chief told Moya that, while no written policy prohibited such dating, CHPD had a consistent practice to reassign the supervisor to avoid the appearance of favoritism.

In June 2007, Chief Boyd returned Moya to the position of police officer based on her failure to meet CHPD standards, as reported by her direct supervisor, Lieutenant Daman Christensen, who said Moya had significant time management issues, was consistently late with staff assignments and performance evaluations, had great difficulty supervising an officer with performance problems, and had difficulty controlling her emotions. The decision had nothing to do with Moya's sexual orientation or dating a subordinate. Christensen said Moya had time management issues in the sergeant position, fell behind in projects, and missed deadlines. She had difficulty developing a procedure for documenting TASER use. She did not timely complete tasks to develop a bicycle patrol team, and some tasks had to be reassigned.

In August 2007, the chief terminated Moya's (still probationary) employment due to failure to meet CHPD standards; his decision had nothing to do with sexual orientation or inter-office dating. Lieutenant Anderson had reported complaints from Moya's supervisor that Moya displayed an extremely negative

attitude, made sarcastic and disruptive comments, and people inside and outside of the CHPD were complaining about her performance and attitude. Moya commented disdainfully, in front of community service officers (CSOs) that certain calls were only for CSOs. One citizen complained Moya was indifferent; another citizen complained Moya sat in a parking lot for an extended period of time, talking on a cell phone and spitting sunflower seeds on the ground. The supervisor observed Moya being rude to an elderly, mentally-disabled citizen. Moya was angry that her time spent on probation in the sergeant position did not count toward her 18-month probationary period in the officer position. She stormed into Lieutenant Anderson's office, face red with anger, stomped her feet and repeatedly shouted, "This is fucked up!"

Defendants submitted to the trial court excerpts of the CHPD Policy Manual regarding CHPD's duty to investigate allegations of police misconduct. Although defendants initially cited Penal Code section 832.5, which requires CHPD to investigate *citizen* complaints, the reply brief to the trial court noted the policy manual contains interrogation and disposition protocols required by the Public Safety Officer's Procedural Bill of Rights Act or POBRA (Gov. Code, § 3303), which is not limited to citizen complaints. Policy 340, Disciplinary Policy, sets forth guidelines as to "CONDUCT WHICH MAY RESULT IN DISCIPLINE," which expressly includes dishonesty and "failure, incompetence, inefficiency or delay in performing

and/or carrying out proper orders, work assignments or instructions of supervisors without reasonable and bona fide excuse." Policy 340, section 340.4 says, "Regardless of the source of an allegation of misconduct, all such matters will be investigated in accordance with Personnel Complaint Procedure Policy Manual § 1020." Policy 1020, "Personnel Complaint Procedure," defines as "[p]ersonnel complaints" any "allegation of misconduct or improper job performance against any department employee that, if true, would constitute a violation of department policy, federal, state or local law." Policy 1020, section 1020.6 ("ADMINISTRATIVE INVESTIGATION OF COMPLAINT") states that interviews shall be conducted pursuant to the procedures set forth in Government Code section 3303.[3]

Policy 340, section 340.9 speaks to the lesser appeal rights of *probationary* employees (such as plaintiffs), but says, "At all times during any investigation of allegations of misconduct involving a probationary sworn officer [such as plaintiffs], such officer shall be afforded all procedural rights set forth in Government Code § 3303 and applicable Department policies." Additionally, Policy 328 (Discriminatory Harassment) requires CHPD to investigate claims of discrimination and harassment in the workplace.

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[3] We note Government Code section 3303 itself states it does not apply to informal counseling or admonition. (Gov. Code, § 3303, subd. (*i*).

Plaintiffs opposed the anti-SLAPP motion, arguing (1) the internal affairs investigation involved only Warner, not Thompson (who plaintiffs claim was not even questioned) or Moya (who was not involved at all); (2) the investigations were not "official proceedings" within the meaning of section 425.16; and (3) the investigations were not the basis of plaintiffs' complaint. Plaintiffs also argued they would likely prevail on the merits.

Each plaintiff submitted a declaration. We disregard the portions of those declarations to which the trial court sustained defendants' evidentiary objections, because plaintiffs do not challenge the trial court's rulings in this appeal.

Warner submitted a declaration, attesting she asked not to supervise Thompson, in order to avoid any perception of favoritism based on their friendship. Warner and Thompson were not involved in a sexual, intimate, and/or romantic relationship at the times when she was asked about it by the various superiors at CHPD. According to Warner, "A dating relationship involves steady romantic involvement and a commitment beyond friendship. Thompson and I are friends, and we have engaged in activities as friends including but not limited to going to movies, having dinner and taking trips together. On two isolated occasions I was intimate with Thompson. The first time was in or around December of 2006, and the second time was in or around February of 2007. Thompson and I have never been involved in any type of *steady* romantic or dating relationship

beyond friendship. The sexual encounters were isolated and not considered by me to be part of any dating relationship." (Italics added.) Warner asserted that Officer Kell was unhappy with Warner for evaluating Kell's performance as merely satisfactory. Kell threatened to make false allegations against Warner. Warner denied telling Kell about lying to a superior about her (Warner's) relationship with Thompson. Warner attested she supervised Thompson on a few occasions only, as acting sergeant. Warner was fired before the internal affairs investigation findings were released. She was told she was being fired for failing to meet performance standards. Warner denied doing anything *intentionally* to intimidate another employee, Kim Romero, who was seen by Warner having coffee with Thompson; at the time, Warner did not even know that Romero and Thompson were in a romantic relationship. Warner said she was subjected to harassing jokes, innuendo and inappropriate inquiries into her private life, which she attributes to her sexual orientation. She knows of heterosexual couples at CHPD who are not subjected to similar treatment.

Thompson submitted a declaration, attesting that as soon as she started working at CHPD in June 2006, rumors and jokes spread about her being in a sexual and/or romantic relationship with Warner, even though no such sexual relationship existed before December 2006. Thompson attested, "Warner and I have never been in any type of *steady* romantic or dating relationship beyond friendship. We have been friends, and we have engaged in

many activities as friends. Warner and I have gone to movies, dinner, and cafes together on numerous occasions, whether with other people or just the two of us. Our relationship never progressed beyond that of a friendship, and we did not engage in any conduct *that I consider to be part of a dating or steady romantic relationship*." (Italics added.) Thompson claimed Officer Kell bore a grudge against her for defending Warner when Kell expressed displeasure at her performance evaluation. Thompson was never notified that she was the subject of an investigation; she was never accused of unprofessional conduct by CHPD; she was never questioned or given an opportunity to address these matters. When she was fired, she was told only that she did not meet performance standards. She never engaged in acts of dishonesty or behavior unbecoming an officer. She considered Sergeant Wheaton her direct supervisor, with Warner merely filling in on occasion. Thompson said she was "subjected to harassing jokes, innuendoes, comments, and gossip, as well as speculation about and inquiry into my private life that I believe was based on my sexual orientation."

Moya submitted a declaration expressing her feeling that Chief Boyd made her choose between her career and her relationship with her subordinate. She did not receive any written warnings or formal counseling about alleged poor performance, time management problems, emotional issues, etc. She was told in June 2007 that she had not followed up with a task, and it was being reassigned. In June 2007, she was

suddenly and unexpectedly demoted from sergeant to police officer. She was never deliberately disruptive, rude or indifferent to others, nor was she ever warned about such behavior. She "strongly expressed [her] disagreement" about the perceived probation extension, but she did throw a tantrum and was not counseled about the incident. She was never interviewed or given an opportunity to address any accusations of poor performance or inappropriate conduct. Throughout her employment at CHPD, she was subjected to "harassing jokes, innuendoes, comments, and gossip" that she attributed to her sexual orientation. She knows of heterosexual couples at CHPD who are not subjected to similar treatment.

Patrol Officer Robert Mariotti declared he worked as a patrol officer from March to November 2007, was supervised by Moya and thought she did a good job; Moya was subjected to scrutiny and hostility not bestowed on heterosexual employees; he overheard "many derogatory comments, gossip, jokes, and innuendo[] regarding Moya and [] Thompson based on their sexuality." At least one comment was made in the presence of a supervisor, who took no corrective action. The jokes increased after Moya was demoted. Mariotti said he is aware of heterosexual employees who were not demoted or terminated, despite being cited for driving under the influence or admitting to lying to the chief regarding police test scores.

Defendants filed a reply, stating in part that CHPD's Policy 1020 was an investigation procedure instituted to comply

with the interrogation and disposition protocols required by POBRA (Gov. Code, § 3303).

The trial court issued a "judgment" (order) denying the section 425.16 motion, incorporating the court's minute order, which said the protected activity asserted as official proceedings included conversations that preceded the CHPD's ISD investigations, the ISD investigations themselves, and the personnel decisions that flowed from those investigations. The trial court faulted defendants for failing to make an evidentiary or legal showing that the internal investigation or personnel procedures were official proceedings under section 425.16. The trial court said CHPD does not have a status comparable to that of quasi-judicial public agencies, and placing every governmental entity on that level would eviscerate FEHA protections for public employees. Since the court found the first prong of a section 425.16 motion had not been met, it did not need to consider plaintiffs' likelihood of prevailing on the merits.

DISCUSSION

I. Legal Standard and Standard of Review

Government agencies and their representatives have First Amendment rights and are "persons" entitled to protection under section 425.16. (*Santa Barbara County Coalition Against Auto. Subsidies v. Santa Barbara County Assn. of Governments* (2008) 167 Cal.App.4th 1229, 1237 (*Santa Barbara*); *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114 [public employees issued

reports and comment on issues of public interest (sheriff's fatal shooting of a homeowner during execution of a search warrant) relating to their official duties].)

"A SLAPP suit . . . seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16--known as the anti-SLAPP statute--to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.] [¶] In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from the protected activity. [Citation.] Under . . . section 425.16 '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike. . . .' [Citation.] . . . [¶] If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.] 'In order to establish a probability of prevailing on the claim . . . , a plaintiff responding to an anti-SLAPP motion must "'state[] and substantiate[] a legally sufficient claim.'" [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the

evidence submitted by the plaintiff is credited." [Citations.]'" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

The purpose and broad construction of section 425.16 is stated in its subdivision (a): "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." The mandate to construe the section broadly was added in 1997. (Stats. 1997, ch. 271, § 1.)

Section 425.16 does not require a defendant to show the complaint was *intended* to chill protected activity, or that it actually had a chilling effect. (*Equilon Enterprises v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 58-67.)

Section 425.16 allows the trial court to strike a complaint "arising from any act of [the defendant] in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue," unless the court determines "that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

A cause of action "arising from" protected activity means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The focus is not the form of the cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability--and whether that activity constitutes protected speech or petitioning. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)

As indicated (fn. 1, *ante*), section 425.16's "act in furtherance of a person's right of petition or free speech . . ." includes: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).)

In making its determination on a section 425.16 motion, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

"In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving

defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citations.] 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute . . . is a SLAPP, subject to being stricken under the statute.' [Citation.]

"On appeal, we review the motion de novo and independently determine whether the parties have met their respective burdens. [Citations.] In evaluating the motion, we consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) However, we do not weigh credibility or compare the weight of the evidence. [Citation.] Rather, we accept as true evidence favorable to the plaintiff, determine whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial, and evaluate the defendant's evidence only to determine whether it defeats that submitted by the plaintiff as a matter of law. [Citations.]" (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1060-1061, citing inter alia, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. Protected Activity

A. Speech

To the extent that plaintiffs' claims of harassment under the FEHA and intentional infliction of emotional distress are based on "jokes, rumors, innuendo," etc. outside of CHPD's personnel procedures, such speech is not protected activity under section 425.16. Plaintiffs do not make this argument, but we shall make it for them. Thus, section 425.16 protects acts in furtherance of "free speech . . . in connection with a public issue . . . ." (§ 425.16, subd. (b).) The statute defines this term to mean (1) statements made in official proceedings authorized by law, (2) statements made in connection with an issue under consideration in an official proceeding, (3) statements made "in a place open to the public or a public forum in connection with an issue of public interest; or (4) or any other conduct in furtherance of . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Plaintiffs allege CHPD employees made jokes and spread rumors and innuendo in the workplace. We see no indication that such alleged activity took place in a public area or in connection with a public issue or an issue of public interest. Therefore, the allegation does not constitute protected activity under section 425.16.

Additionally, an employer that tolerates a hostile work environment in violation of the FEHA may not take refuge in the

claim that the harassment, because spoken, is constitutionally protected speech. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 138, fn. 6 [injunction prohibiting continued use of racial epithets in workplace did not constitute an invalid restraint of speech].)

We do not mean to suggest that plaintiffs have viable claims for harassment or intentional infliction of emotional distress. The California Supreme Court said in the context of a sexual harassment case (rather than sexual orientation): "[T]o establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show she was subjected to sexual advances, conduct, or comments that were *severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment*. [Citations.] Although annoying or 'merely offensive' comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff. [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.)

We recognize that defendants argue the harassment and emotional distress claims fail as a matter of law for other reasons, including that the allegations and declarations do not rise to the level of severe or pervasive conduct. The problem for defendants is that we are reviewing a section 425.16 motion,

not a summary judgment motion. As stated *ante*, under section 425.16, we do not even look at the legal sufficiency of the claims unless and until the defendant shows the claims arise from activity protected by section 425.16. (*Tichinin v. City of Morgan Hill, supra*, 177 Cal.App.4th at pp. 1060-1061.) Defendants fail to meet this threshold.

We conclude the trial court properly denied the anti-SLAPP motion as to count four (harassment), count five (failure to prevent harassment), and count six (intentional infliction of emotional distress).

Our conclusion that the motion was properly denied as to some causes of action does not end our review, because section 425.16 allows striking part of a complaint if some causes of action are SLAPPs and other causes of action are not. (§ 425.16, subd. (b)(1) [a "cause of action" is subject to a motion to strike]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993 (*ComputerXpress*) [affirmed trial court's denial of anti-SLAPP motion as to one group of causes of action but reversed denial as to another group of causes of action].)

We therefore consider the anti-SLAPP motion as to the remaining causes of action.

B. Official Proceeding Authorized by Law

The remaining causes of action are (1) discrimination under the FEHA, (2) retaliation under the FEHA, and (3) wrongful termination in violation of public policy (the public policy being the FEHA). These claims all allege that plaintiffs were

harmed by adverse employment actions motivated by sexual orientation discrimination, in violation of the FEHA (Gov. Code, § 12940).

Defendants argue all of these claims arose from statements made in official proceedings or in connection with issues under consideration or review in official proceedings authorized by law (formal or informal investigations and/or personnel proceedings to determine grounds to terminate peace officer employment), thus constituting protected activity within the meaning of section 425.16, footnote 1, *ante*. We shall conclude section 425.16 applies.

If the complaint arises from activity protected under section 425.16, an allegation that the activity is unlawful does not render the statute inapplicable. (*Santa Barbara, supra*, 167 Cal.App.4th at p. 1238.)

Plaintiffs argue their FEHA-based claims do not target protected activity and therefore are not subject to section 425.16. They overstate the holding of this court in the case cited by the trial court -- *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501 (*Olaes*) -- for the proposition that an employer's internal harassment complaint protocol (in order to comply with FEHA) is not an official proceeding under section 425.16. In *Olaes*, this court held a *private* employer's sexual harassment procedure was not a quasi-judicial or official proceeding within the meaning of section 425.16, and the trial court properly denied the employer's anti-SLAPP motion in a suit

filed by a former employee for defamation, alleging the company falsely accused him of sexual harassment and failed to investigate adequately before terminating his employment. This court held "official proceeding authorized by law" in section 425.16 was intended "to protect speech concerning matters of public interest in a governmental forum, regardless of label." (*Id.* at p. 1507.) Even though the *private* company was required to comply with fair employment laws, "a private employer possesses neither the powers not the responsibilities of a government agency. Instead, each private employer develops its own idiosyncratic methods of handling employee harassment complaints. The corporate individuals implementing those procedures do not act in the capacity of governmental officials performing an official duty. Nor are the resulting proceedings reviewable by writ of mandate." (*Id.* at p. 1509.)

In *Olaes*, this court noted the general rule that the litigation privilege (Civ. Code, § 47, subd. (b) [privileged publication is one made in legislative or judicial proceeding or any other official proceeding authorized by law]) applies to defamatory statements made in quasi-judicial proceedings. However, *Olaes* rejected the company's argument that section 425.16 should also include quasi-judicial proceedings under the same criteria applied to the litigation privilege, criteria which the company assertedly met. (*Id.* at p. 1509.) *Olaes* said, "However, the fact that the private company's personnel department is charged with implementing a harassment policy and

establishes procedures that mimic those of a governmental agency does not transform it into an 'administrative body.' [The private company's] human resource specialist may indeed be vested with discretion, apply California law regarding harassment, and make decisions affecting the personal and property rights of the accused harasser. Still, the human resource specialist is not an administrative body possessing quasi-judicial powers." (*Ibid*.)

Thus, *Olaes* turned on the private nature of the employer and is inapplicable here, where the employer is a governmental entity.

In contrast, an internal investigation by a *state governmental* law enforcement agency is an official proceeding authorized by law within the meaning of section 425.16. *Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, affirmed an order striking a complaint pursuant to section 425.16. There, a retired employee sued his former employer, the California Department of Corrections and Rehabilitation (CDCR), alleging CDCR took retaliatory action against him as a whistleblower, in violation of a Labor Code statute, causing him emotional distress and violating his constitutional rights. The trial court found the complaint arose out of activities protected by section 425.16. Those activities were (1) an internal affairs investigation, which continued after the employee retired, investigating alleged criminal activity during the employment, and (2) acquisition of

a search warrant. No criminal charges were ever filed. (*Id.* at p. 1541.) In addition to holding the search warrant was an activity protected by section 425.16, the *Hansen* court continued, "Further, the internal investigation itself was an official proceeding authorized by law. (*Green v. Cortez* (1984) 151 Cal.App.3d 1068, 1073.[4]) Thus, the objected-to statements and writings, i.e., the allegedly false reports of criminal activity, were made in connection with an issue under consideration by an authorized official proceeding and thus constitute protected activity under section 425.16, subdivision (e)(2). Although Hansen was never formally charged with misconduct or a crime, communications preparatory to or in anticipation of the bringing of an official proceeding are within the protection of section 425.16. [Citation.]" (*Hansen, supra*, 171 Cal.App.4th at p. 1544.)

Although the *Hansen* investigation involved criminal activity, and law enforcement investigation of crimes is certainly a matter of public concern, the absence of a *criminal* investigation in this case does not render section 425.16 inapplicable. Contrary to plaintiffs' argument, *Hansen*'s finding of an official proceeding did not turn on the criminal nature of the alleged misconduct.

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[4] *Green v. Cortez, supra*, 151 Cal.App.3d 1068, held that news media had an absolute privilege under Civil Code section 47, to publish allegedly defamatory statements made by a city councilman at city council hearings.

Other cases indicate internal personnel proceedings by law enforcement or other public agencies are protected activity under section 425.16. For example, *Walker v. Kiousis* (2001) 93 Cal.App.4th 1432 (criticized on other grounds in *People v. Stanistreet* (2002) 29 Cal.4th 497, 512), accepted a California Highway Patrol Officer's concession that a citizen complaint against him involved an official proceeding authorized by law, because Penal Code section 832.5 requires law enforcement agencies to establish a procedure to investigate citizen complaints against peace officers. (*Id.* at p. 1439 [plaintiff failed to show probability of prevailing on merits].) *Miller v. City of Los Angeles* (2009) 169 Cal.App.4th 1373, in the course of holding a civil service commission's finding that a city properly terminated a Water and Power employee for conflict of interest and theft, said that the thrust of the plaintiff's defamation and emotional distress claims was "the City's investigation into his conduct in connection with his public employment and its determination and report that he engaged in misconduct on the job," which was protected activity under section 425.16. (*Id.* at p. 1383.)

In *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, we held section 425.16 applied to a state university employee who filed a civil rights claim against a manager who denied the employee's administrative grievance alleging sexual harassment. We distinguished *Olaes, supra,* 135 Cal.App.4th 1501, stating that we there held "a *private* company's sexual harassment grievance

protocol did not constitute an official proceeding authorized by law. *Olaes* is obviously distinguishable since . . . the Regents' protocol [for handling employee grievances] is equivalent to a state statute." (*Vergos, supra*, 146 Cal.App.4th at p. 1396, fn. 8.) The defendant in *Vergos* was the manager rather than the University, but the complaint arose from her handling of the grievance. We observed the Regents' hearing procedures "have the force and effect of statute," because the Regents is a constitutional entity having quasi-judicial powers, and "statutory hearing procedures qualify as official proceedings authorized by law for section 425.16 purposes." (*Vergos, supra*, 146 Cal.App.4th at p. 1396, fn. omitted, citing *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192 [hospital peer review procedure qualified as official proceeding under section 425.16 because procedure was required by Business and Professions Code statutes, was subject to judicial review by administrative mandate, and played significant role in protecting public against incompetent physicians].)

Here, while we do not go so far as to say that CHPD has constitutionally-endowed quasi-judicial powers like the regents in *Vergos*, the procedures followed by CHPD before terminating plaintiffs' employment for conduct (including dishonesty and poor performance) were conducted pursuant to departmental policies implementing a statutory scheme governing law enforcement agencies' internal investigations and interrogations

that could lead to punitive employment action for peace officers, in order to protect peace officers' employment rights, as a matter of public concern.

Thus, POBRA (Gov. Code, § 3300 et seq.) sets forth procedures for investigations and interrogations of public safety officers, including police officers, of any conduct which could lead to dismissal, demotion, suspension, or other punitive employment actions. (Gov. Code, § 3303.) However, Government Code, section 3303 "shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer . . . ." (Gov. Code, § 3303, subd. (*i*).) Government Code section 3301 states, "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that effective . . . services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California."

Peace officers are subject to high standards of behavior, given their power over citizens. Peace officers must be "of

good moral character." (Gov. Code, § 1031, subd. (d).) The Law Enforcement Code of Ethics calls for peace officers to be "[h]onest in thought and deed in both my personal and official life."

POBRA is "'primarily a labor relations statute. It provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.'" (*Sulier v. State Personnel Board* (2004) 125 Cal.App.4th 21, 26.)

The parties do not discuss POBRA in detail. Defendants merely mention in passing that CHPD acted pursuant to its internal investigation and interrogation policies which had been instituted to implement POBRA. CHPD's policies are arguably broader than POBRA. Policy 1020, the Personnel Complaint Procedure, provides "guidelines for the reporting, investigation and disposition of complaints regarding the conduct of members and employees of this department." Policy 1020 defines "personnel complaints" as "any allegation of misconduct *or* improper job performance against any department employee that, if true, would constitute a violation of department policy, federal, state or local law." (Italics added.)

Plaintiffs suggest *incorrectly* that POBRA applies only to investigations of criminal activity. They cite a subdivision of a statute saying that peace officers must be advised of their constitutional rights if they may be charged with a criminal offense. (Gov. Code, § 3303, subd. (h).) However, section 3303

in its entirety makes clear POBRA applies to any investigation or interrogation "that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment," with no limitation to punishment for criminal activity.

Our review of the record shows defendants submitted to the trial court copies of CHPD's Policies, including Policy 340, which stated in section 340.4, labeled, "INVESTIGATION OF DISCIPLINARY ALLEGATIONS": "Regardless of the source of an allegation of misconduct, all such matters will be investigated in accordance with Personnel Complaint Procedure Policy Manual § 1020. Pursuant to Government Code §§ 3304(d) and 3508.1, the investigation should be completed within [a specified time]." Policy 1020, which is also in the record on appeal, recites the POBRA's procedural requirements (§ 3303) as requirements that must be followed by CHPD during administrative investigation of personnel complaints.

Neither side addresses whether POBRA applies to probationary employees, such as plaintiffs. Although probationary employees may generally be terminated without cause, probationary police officers are entitled to at least some of POBRA's procedural protections. (*Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1358-1361 [if the reason for termination would tend to besmirch the employee's reputation and negatively impact future employment, the probationary officer is entitled to a "liberty interest" hearing to clear his or her

name].) CHPD's Policy 340, section 340.9 ("DISCIPLINARY ACTION AGAINST PROBATIONARY EMPLOYEES") sets some limits on rights of probationary employees but states in subdivision (b), "At all times during any investigation of allegations of misconduct involving a probationary sworn officer, such officer shall be afforded all procedural rights set forth in Government Code § 3303 and applicable Department policies." Plaintiffs were sworn officers.

We conclude that, in following pre-termination policies, defendants engaged in protected activity under section 425.16.

Moreover, plaintiffs' claims arose from and were based on the protected activity. Each plaintiff's termination arose from and was based on the results of the investigation and/or personnel procedures which disclosed and/or substantiated Warner's and Thompson's deception and Moya's performance deficiencies.

Plaintiffs argue that only Warner was the subject of an investigation. However, plaintiffs cite no authority defining "investigation," and we follow the statutory mandate to construe section 425.16 broadly. The California Supreme Court indicated in *County of Riverside v. Superior Court (Madrigal*) (2002) 27 Cal.4th 793, that a POBRA "investigation" includes a background check of a probationary peace officer's pre-employment conduct. (*Id.* at pp. 800-804.) Though the *Riverside* case did not involve section 425.16, it reflects that peace officers' procedural

rights (which are protected by POBRA and CHPD's Policies) are not limited to formal internal affairs investigations.

Plaintiffs cite *Department of Fair Employment and Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, as holding that although an underlying unlawful detainer action may have "triggered" a disability discrimination lawsuit, the "gravamen of the suit was that of disability discrimination," and the fact that a cause of action may have been "triggered" by protected activity does not mean it "arises" from protected activity under section 425.16. "'In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected speech or petitioning activity. [Citations.]'" (*Id.* at p. 1284.) There, the DFEH brought the disability discrimination suit against a landlord that, as part of removing an apartment building from the rental market, had removed a disabled tenant through unlawful detainer after the tenant refused to disclose the nature of her disability (to confirm it qualified for a statutory extension for the tenant to move). Although the DFEH case came after the landlord's protected activity (rent control removal proceedings and unlawful detainer proceedings), it was not based on that protected activity, but rather on the failure to give the tenant an extension of time to move. Thus, the case is inapposite.

Plaintiffs argue section 425.16 may protect Officer Kell from a defamation suit, but it does not protect defendants from

misusing unsubstantiated allegations of a disgruntled employee as a pretext to fire someone because of sexual orientation. Plaintiffs cite *McConnell v. Innovative Artists Talent and Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, for the proposition that adverse employment actions are not an exercise of free speech, and no statements during investigations make them so. However, besides the fact that *McConnell* involved a private employer, it is inapposite. There, wrongful termination and retaliation claims arose from and were based on the employer's "temporary modification" of job duties, which effectively prevented the plaintiffs from performing their job as talent agents. (*Id.* at p. 181.) The appellate court held the facts that the modification was communicated in writing and came immediately after lawsuits were filed (by the talent agents seeking to terminate their contracts) did not convert the adverse employment action into protected activity. (*Ibid.*) Here, the lawsuit arose from and was based on employment termination decisions resulting from mandated proceedings to investigate grounds for employee dismissal.

Plaintiffs argue their lawsuit does not fit the SLAPP model, because it is not "aimed" at squelching free speech rights. However, section 425.16 does not require a defendant to show the complaint was *intended* to chill protected activity, or that it actually had a chilling effect. (*Equilon Enterprises v. Consumer Cause, supra*, 29 Cal.4th at p. 74.)

Plaintiffs argue the internal affairs investigation regarding Warner and Thompson did not trigger the terminations, because Warner and Thompson were terminated before the internal affairs investigation was concluded. However, Warner and Thompson were terminated on September 25, 2007 -- after the September 21, 2007, transcribed CHPD interview in which Warner admitted the true nature of her relationship with Thompson, and that she had "crossed a line" and exercised poor judgment. At that point, there was no need to await the formal findings of the investigation.

Plaintiffs argue the investigation sustained charges against Warner without justification, in that it found she was discourteous to someone who denied that Warner had been discourteous. This is a nonissue for purposes of this appeal.

All three plaintiffs were the subject of internal procedures, reports, and evaluation of deficient job performance or other conduct, such as dishonesty, which could and did result in discipline (termination). Under Policy 340, "CONDUCT WHICH MAY RESULT IN DISCIPLINE" includes not only dishonesty and conduct unbecoming an officer, but also deficiencies in performance: (1) "Work related dishonesty;" (2) "dishonest . . . conduct adversely affecting the employee/employer relationship (on or off-duty);" (3) "[a]ny other on-duty or off-duty conduct which any employee knows or reasonably should know is unbecoming a member of the Department or which is contrary to good order, efficiency or morale, or which tends to reflect

unfavorably upon the Department or its members;" (4) "[a]ny failure or refusal of an employee to properly perform the function and duties of an assigned position"; and (5) "[f]alse or misleading statements to a supervisor."

We recognize Moya claims she was not given warnings about most of her deficiencies before she was terminated. However, she asserts no cause of action for a procedural due process violation.

We conclude that defendants' activity, as a public employer investigating and reviewing alleged dishonesty and deficiencies in performance before taking disciplinary action, constituted statements made in connection with official proceedings authorized by law within the meaning of section 425.16.

We are mindful of the trial court's concern about section 425.16 eviscerating FEHA as to public employees--a point emphasized over and over by plaintiffs. However, that concern is allayed by the fact that section 425.16 has two prongs and will not result in the striking of complaints if the plaintiffs are likely to prevail on the merits.

We conclude that, as to the complaint's first three counts (discrimination, retaliation, and wrongful termination in violation of public policy) defendants met the first prong of section 425.16 by showing the claims arose from defendants' protected activity.

III. Probability of Success

Although defendants' were engaged in protected activity, plaintiffs may avoid an anti-SLAPP dismissal if they show "that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The plaintiff must state and substantiate a legally sufficient claim, i.e., must show not only that the complaint is legally sufficient, but also that the complaint is "'supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19-20.)

Here, the trial court did not reach this second prong of section 425.16, but remand is not necessary because our review is de novo. (*Tichinin v. City of Morgan Hill, supra*, 177 Cal.App.4th at pp. 1060-1061.) In deciding the second prong, we consider the pleadings and evidentiary submissions; we do not weigh the credibility or comparative strength of competing evidence. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105.) We consider "whether the plaintiff has made a prima facie showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor. [Citation.]" (*Ibid.*) We "may also consider the defendant's opposing evidence, but only to

determine if it defeats the plaintiff's showing as a matter of law. [Citations.]" (*Id.* at pp. 105-106.)[5]

We shall explain that, assuming each plaintiff presented a prima facie case of the three applicable counts (discrimination, retaliation, and wrongful termination in violation of public policy), defendants' showing defeated it as a matter of law. Our discussion does not address the three counts to which we have found section 425.16 inapplicable (harassment, failure to prevent harassment, and intentional infliction of emotional distress).

The three applicable counts were premised on the FEHA (Gov. Code, § 12940): (1) discrimination (discharge from employment and disparate treatment based on sexual orientation), (2) retaliation (discharge and disparate treatment for reporting workplace discrimination), and (3) wrongful termination in violation of public policy, i.e., the FEHA.

A prima facie case of FEHA discrimination requires evidence that the plaintiff was a member of a protected class, was performing her job competently, suffered an adverse employment action, and some other circumstance suggesting discriminatory

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[5] We shall address defendants' points despite their failure to give any citation to the record in the argument section of their respondents' brief on appeal. Defendants' reply brief observes plaintiffs' failure to cite to the record violates California Rules of Court, rule 8.204(a)(1)(C). Defendants ask us to disregard points asserted without citation to the record. (*Stockinger v. Feather River Comm. College* (2003) 111 Cal.App.4th 1014, 1024-1025.) We shall consider plaintiffs' points, this time, despite the defect.

motive. (*Guz v. Bechtel Nat. Inc*. (2000) 24 Cal.4th 317, 354.) If the defendant presents evidence of nondiscriminatory reasons for its actions, the plaintiff must show evidence that the asserted reasons were pretextual and the actual motive was discriminatory. (*Id*. at p. 361.)

A prima facie case of retaliation requires evidence that the plaintiff engaged in protected activity after which she was subjected to an adverse employment action, and there was a causal link between the protected activity and the adverse action. (*Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 69.) The adverse action must follow within a relatively short time of the protected activity. (*Ibid*.) Again, if the defendant offers legitimate reasons, the plaintiff must show evidence that the proffered reasons were pretextual. (*Id*. at p. 68.)

A. Discrimination

As to the discrimination claim, plaintiffs as lesbians are members of a protected class and they suffered an adverse employment action (termination). Warner and Thompson submitted CHPD performance evaluations showing commendable or exceptional performance. Moya submitted a declaration from a former subordinate, former CHPD patrol officer Robert Mariotti, who opined that Moya performed competently. For the final element (circumstance suggesting a discriminatory motive), plaintiffs rely on their evidence that they were subjected to jokes,

rumors, innuendo, etc., based on sexual orientation. We have explained the insufficiency of this evidence.

We shall address separately the termination of each plaintiff.

1. Warner

Defendants showed a legitimate nondiscriminatory reason for firing Warner, because she was dishonest.

Warner lied to her superiors by (1) denying her intimate relationship with Thompson and, when caught, (2) by claiming it was not really a "dating" relationship. Any reasonable person would scoff at the disingenuousness of Warner's claim that she had no relationship to report because she did not "date" Thompson but merely went out to dinners and movies with her, shared a room on vacation, spent the night at each others' homes, and had sex. That Warner claims they had sex only twice is inconsequential.

Warner admitted she exercised poor judgment, and her relationship with Thompson "crossed the line."

Disclosure of the relationship was important so that her superiors could avoid potential problems with the appearance of favoritism. Even though Warner asked not to supervise her "friend," her failure to disclose the nature of the relationship left defendants ignorant and resulted in Warner supervising Thompson on occasion, even if Warner was not responsible for Thompson's performance evaluations. Although plaintiffs contend on appeal that Warner "was never THOMPSON's direct supervisor,"

Warner's declaration admitted, "I supervised Thompson temporarily as acting Sergeant, and only on a few occasions, at the direction of CHPD management. When Sergeant Wheaton was not working his normal shift, I was forced to supervise Thompson; however, Lieutenant Bechler typically worked such shifts with me, and thus I did not perceive any conflict in temporarily supervising Thompson beyond that which I had already expressed [based on friendship]." Thus, Warner kept CHPD ignorant of the true nature of the relationship, yet blames CHPD for any resultant conflict of interest.

On appeal, Warner adheres to her indefensible position that a "dating relationship" is a legal term of art requiring an ongoing commitment with romance in the air.

Plaintiffs cite Warner's glowing performance evaluations. However, those were given before defendants learned about Warner's dishonesty.

It also does not matter whether Kell bore a grudge against Warner. Warner's claim is defeated by the indisputable fact that she, a sworn peace officer whose powers and duties demand good moral character (Gov. Code, § 1031), was dishonest with defendants.

We conclude Warner failed to show a probability of prevailing on the merits.

2. Thompson

Plaintiffs argue there is no evidence of dishonesty by Thompson, and defendants never even questioned her about her

relationship with Warner. However, Lieutenant Anderson's declaration said that on March 20, 2007, she met in person with both Warner and Thompson and told them if the alleged conduct was true (i.e., if someone was spreading a false rumor about a relationship between Warner and Thompson), CHPD would not tolerate it. Anderson attested: "Thompson said she had heard that the sergeant had asked about the Warner-Thompson relationship and suggested that it was more than a friendship. Warner told me that although she and Thompson were and had been friends, they had never had a dating relationship." We recognize Warner's declaration asserted Thompson was out of the room when Warner expressly denied a dating relationship. We recognize our obligation in reviewing a section 425.16 issue to accept plaintiffs' evidence as true, regardless of credibility problems. (*Tichinin, supra*, 177 Cal.App.4th at p. 1060.) Nevertheless, Warner does not deny that Thompson was present for part of the conversation and knew what it was about. Thus, Warner attested that in March 2007, "Thompson and I were contacted by Lieutenant Anderson regarding a report of continuing rumors, jokes, innuendoes, inquiry and gossip about Thompson and I [*sic*]." Thus, even if Thompson was never directly asked and never expressly denied having an intimate relationship with Warner, Thompson by her silence certainly engaged in deceit and misdirection -- conduct unbecoming a police officer.

Plaintiffs claim Lieutenant Anderson's March 22, 2007, memorandum stated Thompson was not in the room when Warner was questioned about her private life. However, the same memorandum also describes that, before Thompson left the room, Anderson questioned her about the alleged rumors, and Thompson complained that a CHPD sergeant was "suggesting that the relationship [between Thompson and Warner] was more than a friendship and possibly romantic in nature," and that they were having an affair, and some officers were suggesting Thompson received the canine assignment only because she was "allegedly having an affair" with Warner, and Thompson said she was "so upset by the rumored affair" with Warner that Thompson was considering quitting. It is true that none of this material contains an express claim by Thompson that the rumor was false. However, she certainly gave that impression. Perhaps she did not out-and-out lie, but she certainly engaged in deception unbecoming a police officer.

Additionally, there was evidence that defendants had information about Thompson engaging in deceit and conduct unbecoming an officer. Officer Kell's peer review response said that *both* Thompson and Warner told her not to say anything about their relationship to defendants, and *both* Thompson and Warner encouraged her to imply to defendants that the person alleged to be spreading the "false" rumor was biased against lesbians.

We conclude Thompson failed to show a probability of prevailing on the merits.

3. Moya

As to Moya, plaintiffs contend there was no official proceeding (apparently because there was no formal investigation). However, there was an official proceeding -- the POBRA-based CHPD policies which had to precede the adverse employment action against Moya.

To the extent plaintiffs mean to claim that the criticisms of Moya's performance were pretexts covering up sexual orientation discrimination, we see no sufficient evidence supporting such a theory. Moya presented no evidence that the criticisms about her inability to handle the work were false.

Moya also attested she did not receive any "written" warnings or "formal" counseling about the deficiencies in her performance, except one comment that she did not follow up on a task, which was being reassigned to someone else. However, Moya did not allege any cause of action for violation of procedural due process.

Once an employer articulates legitimate business reasons for an adverse employment action, the plaintiff must produce substantial evidence that the reasons are pretextual. (*Guz v. Bechtel Nat. Inc.*, *supra*, 24 Cal.4th at pp. 354, 361.)

Moya failed to produce any such evidence. She merely denied being "deliberately" rude to citizens, and she admitted she "strongly expressed" her displeasure about the length of probation but denied she threw a "temper tantrum." The fact that she voluntarily disclosed six months before her termination

that she had dated a subordinate does not constitute substantial evidence of pretext. Her "feeling" that she was made to choose between her career and the relationship does not demonstrate sexual orientation discrimination or hostile work environment. Her "belief" that unspecified "harassing" rumors and jokes by unspecified persons on unspecified occasions were based on sexual orientation does not demonstrate discrimination or harassment attributable to defendants, even when appended to an assertion that heterosexual employees are not subjected to similar treatment.

As indicated, Moya also attested that "[o]n several occasions one sergeant made comments to me that lesbians have more problems and cause more problems than straight people." However, Moya failed to identify when or by whom such comments were made or in what context, and there is no evidence such comments were ever brought to the attention of defendants.

Moya faults defendants for failure to submit her time records to prove she was constantly late. The records were not required.

Moya complains (1) her probationary period was too long, and (2) she was given no opportunity to challenge the complaints about her performance. However, the complaint asserts no cause of action on these bases.

We conclude Moya failed to show a probability of success on the merits.

B. Retaliation

As to retaliation, plaintiffs must show they engaged in protected activity after which they were subjected to adverse employment action, and there was a causal link between the two. (*Morgan v. Regents of University of Cal., supra*, 88 Cal.App.4th at p. 69.) The protected activity alleged in the complaint was "opposing and/or reporting workplace discrimination on the basis of sexual orientation," which allegedly caused plaintiffs' termination from employment and/or disparate treatment. However, the evidence we have already discussed, showing legitimate reasons for termination and insufficient evidence of pretext, defeats the retaliation claims as well.

C. Wrongful Termination - Public Policy

Plaintiffs' claim for wrongful termination in violation of public policy identifies FEHA as the public policy. We have already explained plaintiffs' failure to show a probability of prevailing on the merits.

D. Conclusion Re Merits

We conclude plaintiffs are unlikely to prevail on the merits on the first three counts (discrimination, retaliation, and wrongful termination in violation of public policy). We need not address defendant's alternate theories that these counts fail for other reasons, such as failure to exhaust administrative remedies.

Defendants are entitled to have the first three causes of action stricken under section 425.16.

IV. Costs and Attorney Fees for the Appeal

Defendants ask that we award them costs and attorney fees for the appeal under section 425.16, subdivision (c), which says, "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Such an award is mandatory. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1037.) Plaintiffs respond nonresponsively that their complaint does not target speech, let alone protected speech. They also cite the inapposite case of *Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, which awarded attorney fees to a plaintiff who defeated a frivolous anti-SLAPP motion. (*Id.* at p. 469.)

Defendants who prevail *in part* on an anti-SLAPP motion are entitled to a partial award of attorney fees under section 425.16. (*ComputerXpress, supra*, 93 Cal.App.4th at pp. 1016-1020.) We think the same rule applies to partial victory on appeal.

We conclude defendants are entitled to a partial award of costs and attorney fees incurred in the trial court, to reflect the partial success of their section 425.16 motion, and to a further partial award of attorney fees for the appeal, amounts to be determined by the trial court.

DISPOSITION

The order denying the Code of Civil Procedure section 425.16 motion to strike is affirmed with respect to the fourth,

fifth, and sixth counts of the complaint (harassment, failure to prevent harassment, and intentional infliction of emotional distress) and reversed as to the first, second, and third counts (discrimination, retaliation, and wrongful termination in violation of public policy). Upon an appropriate motion and factual showing, defendants may recover part of their attorney fees and costs incurred in the trial court in connection with their SLAPP motion and a part of their attorney fees for the appeal, in amounts to be determined by the trial court. Defendants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

SIMS, Acting P. J.

We concur:

NICHOLSON, J.

RAYE, J.